IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.

S. B. CIVIL MISC. APPEAL NO. 641/1998

M/S. JAI SHREE CONSTRUCTION COMPANY
v
STATE OF RAJASTHAN & ANR.

DATE OF JUDGMENT: 21st MARCH, 2007.

Hon'ble Mr. Justice R. S. Chauhan

Mr. S.K. Dhamani for the appellant.
Mr. S.N. Gupta for the respondents.

By Court:

This appeal arises out of judgment dated 31.3.98 passed by the District Judge, Jaipur City, Jaipur whereby the learned Judge has made the award dated 31.10.94 a rule of the court.

The brief facts of the case are that the Irrigation Department had invited tenders for construction of Pipla Dam Irrigation Project in the year 1991. Since the appellant-Company had submitted the lowest tender, on 15.10.91 it was accepted. On 19.10.91, the work order was issued to them. According to the said work order, the construction of the project was to start on 30.10.91 and was to be completed by 29.4.92. As per the appellant, he had tried his level best to complete the project. But due to certain obstructions, the project could not be completed. Therefore, the

appellant-Company was compelled to suspend the work. Naturally disputes arose between the appellant-Company and the Department. In accordance with Clause 23 of the Contract, the appellant-Company requested the Chief Engineer-cum- Addl. Secretary, Irrigation Department to appoint a sole arbitrator. However, the Department did not appoint any arbitrator. Therefore, the appellant-Company filed an application under Section 20 of the Arbitration Act, 1940 (henceforth to be referred to as 'the Act', for short) before the District Judge, Jaipur City, Jaipur. During the proceedings, while the appellant-Company submitted a panel of five names, the respondents submitted a panel of three Superintending Engineers. According to Clause 23 of the Contract only a technical person could be appointed as the sole Arbitrator. This was in logic of things as the sole arbitrator was supposed to adjudicate on technical aspects. However, notwithstanding the clearcut stipulation in Clause-23, the learned Judge appointed a Chartered Accountant, Mr. Rajendra Prasad Sharma as the sole arbitrator. Both the parties raised an objection about the appointment of the Chartered Accountant as the sole arbitrator, but the objections went un-noticed. According to the appellant-Company, it received the first notice from the Chartered Accountant on 20.8.94 with regard to the commencement of the proceedings. However, the notice informed him that he is to appear before the arbitrator on 3.7.94. Thus the notice was received after the

date of hearing before the arbitrator. Hence, it was a meaningless notice. Meanwhile, the appellant filed a review petition before the District Judge on 6.9.94, which was replied by the respondents on 1.11.94. During the pendency of the review petition, a second notice was received by the appellant on 29.5.94. However, the date of hearing shown in the notice was 29.4.94. Thus, again the notice was meaningless as it was related to a date prior to the receipt of the notice. On 29.10.94, the appellant informed the Chartered Accountant, Mr. Sharma about the pendency of the review petition. However, without waiting for the learned District Judge to pronounce his decision, on 30.10.94 without giving any opportunity of hearing to the appellant, the learned sole arbitrator pronounced his award. After pronouncing his award, the learned sole arbitrator put a note wherein he stated that on 31.10.94 he received a Registered letter from the appellant-Company informing him about the pendency of the review petition before the learned Judge. However, as he had already pronounced the award, he was not in a position to change the award. Thereafter in accordance with the provisions of the Act, the award was submitted before the learned Judge for making it rule of the court. Vide order dated 31.3.98, the learned Judge made the award rule of the court. Hence, this appeal before this Court.

Mr. S.K. Dhamani, who represents the appellant-

Company, has argued that under Clause 23 of the Contract, if any question or difference or objection in connection with out of the instrument arises, then the Chief Engineer shall appoint a person not below the rank of Superintending Engineer of Rajasthan Government as the sole arbitrator. The sole arbitrator was enjoined to give a reasoned award. Thus, according to the said Clause only a person with technical background would be appointed and no one else. However, without following Clause 23, the learned judge had appointed a Chartered Accountant, Mr. Rajendra Prasad Sharma as the sole arbitrator. Voicing his objection to the appointment of a Chartered Accountant, the appellant had filed a review petition. But even before the review petition could be decided, the learned sole arbitrator passed his award. He has further argued that once the learned sole arbitrator was informed about the pendency of the review petition, he should have abstained himself from continuing the proceedings. However, in a hot haste, without giving an opportunity of hearing to the appellant, the sole arbitrator passed his award. Even during the proceedings before the learned Judge while making the award a rule of the court, the appellant had raised his objection about the jurisdiction of the learned sole arbitrator, but he same has been rejected without any rhyme or reason.

On the other hand, Mr. S.N. Gupta, learned counsel for the respondent has supported the impugned order.

We have heard both the learned counsels and have perused the impugned order.

Clause 23 of the Agreement is as under :-

> **"Clause 23-- If any question, difference or objection whatsoever shall, arise in any way in connection with or arising out of this instrument or the meaning of operation of any part thereof or the rights, duties or liabilities of either party, then save in so far as the decision of any such matter as herein before provided for and has been so decided, every such matter constituting a total claim of Rs. 5000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contact should be terminated or has been rightly terminated and as regards the rights or obligations of the parties as the result of suo termination shall be referred for adjudication to a sole arbitrator to be appointed as hereinafter provided.**
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> **For the purpose of appointing the sole arbitrator referred to above the Chief Engineer will on receipt of notice and prescribed fee from the contractors send a panel of 3 names not belong the rank of Superintending Engineer of the Rajasthan Government and who shall all be presently unconnected with the contract. The contractor shall on receipt of the names as aforesaid select any one of the persons named, to be appointed as a sole arbitrator and communicate his name to the Chief Engineer, The Chief Engineer shall thereupon appoint the said person as the sole arbitrator without delay. The Arbitrator shall give reasons for award.**
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> **Subject as aforesaid the provisions of the Arbitration Act 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."**

A bare perusal of the said clause clearly reveals that the

Chief Engineer was empowered to appoint an office not below the rank of Superintending Engineer of the Rajasthan Government. Thus, the letter and spirit of Clause 23 is that only a person with a technical background in engineering should be appointed. Considering the fact that the project dealt with the construction of a dam, it was in logic of things that a person with technical background should be appointed as the sole arbitrator. Therefore, the appointment of a Chartered Accountant – a non-technical person in matters of engineering - was absolutely contrary to the letter and spirit of Clause 23 of the contract. Even if it is argued that the learned Judge has ample power to appoint a sole arbitrator under the provisions of the Act, the said discretion has to be exercised judicially and not capriciously or whimsically. The learned Judge should have realized the nature of the project under construction, the nature of the knowledge required for deciding the dispute. Therefore, to appoint a Chartered Accountant, who may not even be aware the fundamentals of the engineering, was most inapt and arbitrary. Repeatedly, the appellant had been running from pillar to post trying to raise his objection about the appointment of an incompetent person as the sole arbitrator. But, his efforts were fruitless. In matters concerning arbitration a pedantic and technical view should not be adopted. Instead, a pragmatic and liberal view should guide judicial discretion. The appellant had genuine dispute

and differences with respondents. The appellant had a legitimate expectation arising from the contract and from the law that a competent person, who understands nuisances of the differences and disputes would have been appointed. The appellant had also voiced his objections, the appellant expects that not only justice be done to him but it must appear to have been done. Therefore, the impugned order cannot be sustained and the award passed by a person not competent to decide the dispute can also not be confirmed. Therefore, this court has no other option but to quash and set aside the award dated 6.9.94 and the impugned order dated 31.3.98. Since the dispute is a decade old, the respondents are expected to appoint a sole arbitrator or to have a sole arbitrator appointed through the court of law immediately and it is hoped that the learned sole arbitrator would decide the dispute as expeditiously as possible.

With these observations, this appeal is allowed. There shall be no order as to costs.

(R.S. CHAUHAN) J.

MRG.